No. 88-1503

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IN THE
Supreme Court of the United States
October Term, 1989

NANCY BETH CRUZAN, by her parents and co-guardians, Lester L. and Joyce Cruzan

Petitioners

vs.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON

Respondents

vs.

THAD C. McCANSE, *Guardian ad litem,*

Respondent

WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

BRIEF OF BARBARA BURGOON AND RUTH FIELDS AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether the State should have considered the role of the family and other factors such as the burden of continued treatment, medical opinion, and the personal values and beliefs of the patient in balancing the State's interest in life against the right of Nancy Cruzan to determine her medical treatment;

2. Whether a court appointed guardian has the authority to make health care decisions on behalf of an incompetent patient; and

3. Whether a State's policy as set forth in its living will statute controls an individual's constitutional right to determine treatment.

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BRIEF OF BARBARA BURGOON AND RUTH FIELDS AS *AMICUS CURIAE* SUPPORTING PETITIONERS

STATEMENT OF INTEREST

The parties submitting this brief *Amici Curiae* in support of petitioner are residents of Maryland who successfully sought the withdrawal of artificial nutrition and hydration on behalf of close family members in persistent vegetative states.[1] Both

[1]Letters of consent to the filing of this brief have been obtained from the parties and filed with the clerk.

decisions to withdraw treatment were based upon lifetimes of knowledge, since neither patient had prepared specific written directives in this regard.

Amicus Barbara Burgoon was appointed in June 1988 by the Circuit Court of Prince George's County to serve as guardian of the person and property of her mother, Katherine N. Buker. Mrs. Buker was then eighty-eight years old, diagnosed as being in a persistent vegetative state following a stroke in 1987, and resided in a nursing home where she received all of her nutrition and hydration through a nasogastric tube. Neither Mrs. Buker herself, nor her family, had at any time consented to the insertion of the nasogastric tube. In fact, Mrs. Buker had expressly informed hospital staff that she did not want "tubes". Despite her verbal directives, however, the tube was inserted and the family obligated to obtain court authority to remove it.

As guardian, Amicus Burgoon obtained the court's permission to direct the withdrawal of the nasogastric tube. Amicus Burgoon's two siblings and her father, Mrs. Buker's husband of sixty-nine years, supported this request. The court found that her medical condition would not improve and that she would not have wanted such treatment to continue.

Amicus Ruth Fields' husband of forty-five years, James Fields, suffered two strokes and numerous blood clots which caused paralysis on his right side, required an above-knee amputation of his right leg and caused his body to revert to the fetal position. After the second stroke in September 1988, Mr. Fields' mental capabilities deteriorated totally, and he was diagnosed by his physician as being in a persistent vegetative state. In November 1988, Mr. Fields was unable to swallow and, with the consent of the family, a gastrostomy tube was inserted for the provision of hydration and nutrition.

Before the deterioration of Mr. Fields' mental capabilities, he discussed with his wife his desire to die with dignity. Although he never prepared a written directive concerning health care decisions, he verbally expressed his desire not to be maintained in a vegetative state when there was no potential for recovery.

In February 1989, Mr. Fields' physician informed Amicus Fields and the Fields' only son that Mr. Fields lacked any potential for recovery. Consistent with her husband's previously expressed wishes, and his physician's diagnosis and recommendations, Amicus Fields requested the withdrawal of further mechanical life-support, including the gastrostomy tube, from her husband.

The nursing home refused to follow the physician's orders absent a court order. Amicus Fields was able to transfer her husband to another nursing home which agreed to follow physician's orders and withdraw the gastrostomy tube without judicial intervention.

As a direct result of their experiences, both Amicus Burgoon and Amicus Fields prepared written directives authorizing designated family members to make medical decisions on their behalf, including the withholding or withdrawal of artificially administered sustenance, in the event of mental incapacity coupled with terminal illness or persistent vegetative state. In so doing, they relied on a 1988 Opinion of the Maryland Attorney General, 73 Op. Att. Gen. (1988) [Opp. No. 88-046 (Oct. 17, 1988)],[2] construing the Maryland living will statute. The Maryland statute, like that of Missouri, prohibits a directive to withhold nutrition and hydration. However, the Maryland Attorney General interpreted the living will law to be cumulative with common-law and constitutional rights to

[2] A copy of the opinion has been filed with the clerk of this Court.

refuse such treatment, and determined that a directive specifying that artificial sustenance be withheld was valid and enforceable. It is the desire of Amici to prevent their families and loved ones from experiencing the emotional trauma and upheaval which they suffered in seeking to carry out the wishes of their loved ones.

SUMMARY OF ARGUMENT

I. Nancy Cruzan's right to determine the course of her medical care was unconstitutionally abridged when the Missouri court refused to allow her parents in consultation with her physicians to withdraw the artificial nutrition and hydration she was receiving. Her parents' decision was based on their firm belief that their daughter would have desired that course of treatment rather than endure her life in a persistent vegetative state. Close family members have long been recognized as surrogate decision makers by the medical profession and by every court except the Missouri court. *Pratt v. Davis*, 224 Ill. 300, 79 N.E. 562 (1906). In acknowledging this practice numerous states have codified the procedure of obtaining medical consent from family members.

When making medical treatment decisions, families draw upon life times of shared experiences, values and beliefs and, in some cases, expressed written or verbal directives. In addition family members will have consulted at length with and obtained opinions from the patient's physicians. In its failure to consider these factors in its refusal to authorize the withdrawal of medical treatment, the Missouri court has in effect cast aside the deference accorded to family decisions protected by this Court. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

In its determination that a gastrostomy tube was not burdensome to Nancy Cruzan the Missouri court ignored the findings

of the lower court and other courts which have reviewed similar medical procedures. *Gray v. Romeo*, 687 F.Supp. 580 (D.R.I. 1988); *Brophy v. New England Sinai Hosp.*, 398 Mass, 417, 497 N.E. 2d 626 (1986). In refusing to permit a family of a patient in a persistent vegetative state to discontinue noncurative treatment once it has begun, while acknowledging that consent is necessary to commence such treatment, the court may encourage loving and involved families to withhold that initial consent and give up hope prematurely. Numerous senior citizens, such as the Amici here, do not want their right to medical self-determination abridged by a court without any consideration of their personal values and other factors such as the availability and good faith of their families. The Missouri court failed to consider any such factors in reaching its decision.

II. By denying a court appointed guardian the authority to refuse medical treatment the Missouri court stands alone. Some states permit the guardian to exercise the ward's rights to refuse treatment directly, *see, e.g., In re Drabick*, 245 Cal. Rptr. 840 (Cal. Ct. App.) *cert. den.* 109 S.Ct. 399 (1988), and others require prior court approval, *see e.g., Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E. 2d 417 (1977). Family guardians must have the continued authority to make medical decisions on behalf of their loved ones, including decisions to withdraw life support, if the ward is existing in a persistent vegetative state. The incompetent patient does not lose her right to refuse medical treatment because she cannot exercise it freely. The right retains its meaning only if an agent can exercise it on her behalf. *Gray v. Romeo*, 691 F.Supp. at 587.

III. By interpreting Missouri's living will statute as enunciating the State's policy to preserve life regardless of the values and interests of the patient, the Missouri court narrows the constitutional and common law rights of adult citizens to make their medical care decisions. Other jurisdictions, when faced with the issue of whether a legislature can limit the right

to refuse medical treatment by precluding the use of living will statutes to withhold nutrition and hydration, have found the statutory restrictions to be cumulative with, and not contradictory to, other inalienable rights. *In re Gardner*, 534 A.2d 947 (Me. 1987); *Corbett v. D'Alessandro*, 487 So.2d 368 (Fla. App.), *rev. den.* 492 So.2d 1331 (Fla. 1986). In Maryland, particularly, the Attorney General has opined that although the living will statute requires the administration of artificial sustenance, citizens of Maryland retain all of their rights to refuse such treatment. 73 Opinions of the Attorney General ____, 19-22, (1988) [Opp. No. 88-046 (Oct. 17, 1988)]. If this Court sanctions the interpretation of the Missouri court, adult citizens such as Amici who have carefully planned for future incapacity face the possibility of losing control of their destiny as included in their written statements or as stated to their physicians and loved ones.

I. BY FAILING TO CONSIDER THE UNIQUE ROLE OF THE FAMILY AND OTHER FACTORS SUCH AS THE BURDEN OF CONTINUED TREATMENT, MEDICAL OPINION, AND THE PERSONAL VALUES AND BELIEFS OF THE PATIENT HERSELF, THE MISSOURI COURT ERRED IN HOLDING THAT THE INTEREST OF THE STATE IN PRESERVING ALL LIFE OUTWEIGHED THE RIGHT OF NANCY CRUZAN AND HER FAMILY TO DETERMINE HER MEDICAL CARE.

A. The Court Should Recognize The Role of The Family In Decisions Concerning The Termination of Health Care.

The case before this Court is not one in which a state, or an individual, attempts to withhold medical treatment from a severely disabled individual who has never been able to form an opinion as to the continuation or withholding of such treatment. Nor is it a case where such withholding is sought merely because an individual is aged and/or frail. Rather, it is a situation where a concerned and loving family seeks to carry out its daughter's directions, in consultation with physicians, when all possible hope of improvement is exhausted. Your Amici herein carried out the directions of their loved ones who, like Nancy Cruzan, were in persistent vegetative states,[3] and authorized the withdrawal of artificial nutrition and hydration. They seek to protect their right to act on behalf of family members, and to have their designated relatives carry out their own directions concerning medical treatment.

The right to refuse treatment is not lost when the patient lacks decision making capacity. "The recognition of that right must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both." *Superintendent of Belchertown State School v.Saikewicz*, 373 Mass. 728, 370 N.E.2d 417, 427 (1977) *(Saikewicz)*. The difficulty arises in determining who should exercise the right on the patient's behalf. Every court which has decided right to refuse life-sustaining treatment cases, with the exception of the Missouri court, has found the substituted judgment doctrine to be the preferred method of determining

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[3]" 'PVS is a type of comatose state in which the cerebral functioning has ceased but in which the brain stem functioning is fully or partially intact. The brain stem controls primitive reflexes, including heart activity, breathing, the sleep/wake cycle, reflexive activity in upper and lower extremities, some swallowing motions and eye movements. Marcia shows signs of each of these activities. The cerebrum, on the other hand, controls sensation and voluntary and conscious activities. Marcia's cerebrum has been damaged severely, and as a result she displays no voluntary or conscious movements, nor does she display any awareness or sensation. This combination of reflexive activity in the absence of sensation or conscious activity is characteristic of PVS. PVS is generally a permanent condition.' " *Gray v. Romeo*, 697 F.Supp. 580, 582 (D.R.I. 1988).

the wishes of the incompetent patient.[4] See., e.g., *In re Quinlan*, 70 N.J. 10, 355 A.2d 646, *cert. den.*, 429 U.S. 922 (1976); *Brophy v. New England Sinai Hospital*, 398 Mass. 417, 497 N.E.2d 626 (1986). Under this doctrine the surrogate makes a decision based on what the patient would have chosen for herself.

The Missouri court rejected the substituted judgment doctrine and concluded that the right to refuse treatment cannot be exercised by a third party on behalf of the patient absent the most rigid formalities. *Cruzan v. Harmon*, 760 S.W.2d 408, 425, 426 (Mo. 1988). In so doing the court ignored the realities of day-to-day medical decisionmaking and the importance of family members in these matters.[5]

Doctors have traditionally looked to family members and other surrogates to give consent for medical treatment when

[4]The New York Court of Appeals has specifically rejected the substituted judgment approach and limited its inquiry to the expressed intent of the patient. However, in looking to the patient's expressed intent, it is actually applying a substituted judgment standard and requiring a greater degree of proof of the patient's intentions. *In re Westchester County Medical Center*, 72 N.Y.2d 517, 534 N.Y.S.2d 886 (1988).

Most courts recognize that in certain instances, when there is no reliable evidence of the patient's intent, the substituted judgment standard is inapplicable. The surrogate decisionmaker must then apply a "best interests" standard. *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674, 689 (1987).

[5]This Court has recognized that the respect given to the family goes beyond the nuclear family and includes the extended family. *Moore v. East Cleveland*, 431 U.S. 494, 504 (1977). Although Amici are the wife and daughter of individuals who were in persistent vegetative states, they ask the court to construe the term "family" broadly in these matters. In some instances, distant family members will be asked to carry out the wishes of the patient. *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985). In others, individuals who have had a long-term relationship with the patient but who are not related to him by blood or marriage are the most able to protect or articulate the patient's desires in these matters. *In re Drabick*, 200 Cal.App.3d 185, 245 Cal.Rptr. 840, *cert.den.*, 109 S.Ct. 399 (1988).

the patient is incapable of so doing.[6] The earliest cases involving consent recognized this practice. See e.g., *Pratt v. Davis*, 224 Ill.300. 79 N.E.562, 564 (1906); *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905); *Rolater v. Strain*, 39 Okla. 572, 137 P. 96 (1913). State legislatures have begun to codify the custom in family consent statutes.[7] One commentator noted that the practice is "so well known in society at large that any individual who finds the prospect particularly odious has ample warning to make other arrangements better suited to protecting his own ends or interests." Capron, "Informed Consent in Catastrophic Disease Treatment and Research," 123 U.Pa.L.Rev. 340, 424-25 (1974).

Family members, or those associated with the patient in a close familial relationship, are most likely to know and share the values of the patient. If the patient has expressed her treatment preferences she would most likely have expressed them to those with whom she is closest and whom she expects to carry out her wishes as their last act of love.

Amici herein on behalf of their loved ones based their requests to terminate artificial feeding on their conversations and discussions concerning the patients' desires for continued

[6]A decision to terminate treatment made with the concurrence of the patient or her family is acceptable ethically to the medical profession today. American Medical Association's Council on Ethical and Judicial Affairs, *Withholding or Withdrawing Life-Prolonging Medical Treatment*. (1986).

[7]Ark. Stat. Ann. § 20-9-602 (1987); D.C. Code Ann. § 21-2210 (Supp. 1989); Ga. Code Ann. § 31-9-1 (1985); Idaho Code § 39-4303 (1985); Ind. Code § 16-8-12-4 (Burns Supp. 1988); La. Rev.Stat.Ann. § 40:1299.53 (1977); Me. Rev. Stat. Ann. Tit.24, § 2905 (Supp.1988); Md. Health General Annotated § 20-107 (Supp. 1988); Miss. Code Ann.§ 41-41-3 (Supp. 1988); N.Y. Pub. Health Law § 2965.59 (4)(a) (McKinney Supp. 1989); Utah Code Ann. § 78-14-5 (4)(1987); Vt. Stat.Ann. Tit.12. § 1909(c)(3),(d) (Supp. 1985); Wash. Rev. Code Ann. § 7.70.065 (Supp. 1988); W. Va. Code § 16-5c-5a (Supp. 1988).

treatment under these dire circumstances. Although Mr. Fields never prepared a written directive concerning health care decisions, he verbally expressed his desire not to be maintained in a vegetative state if there was no potential for recovery. Mrs. Buker, who, as the wife of a minister, regularly visited community members attached to life support systems, voiced her opinions on artificial sustenance over the years. Amici's decisions, albeit difficult, were bolstered by lifetimes of shared experiences, values and beliefs, which supported their understanding that their loved one's expressed treatment preferences were founded on longstanding and firmly held convictions.

Amici urge this Court to recognize that the interest of the patient as expressed herself or as represented by her family as surrogate decisionmakers outweighs any State interests. The substituted judgment standard best recognizes the personal autonomy inherent in the right to be free from unwanted bodily invasion by giving primary weight to the expressions of the individual.

This Court has recognized the integrity of the family to choose its way of life, even when it differs from that chosen by most citizens. "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Wisconsin v. Yoder*, 406 U.S. 205, 223-224 (1972). The Missouri court, by ignoring the deference accorded the family, has failed to heed the warning of this Court against "clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." *Moore v. East Cleveland*, 431 U.S. 494, 501 (1977). The right of the family to act as surrogate decisionmaker is deserving of such shelter.

B. The Court Incorrectly Determined That The Administration of Artificial Hydration and Nutrition Is Not Burdensome Treatment to Nancy Cruzan.

1. The treatment being received is burdensome to Nancy Cruzan.

The Missouri court balanced the burdens of the treatment to Nancy Cruzan against the benefits she received, and determined that the provision of artificial nutrition and hydration to her was not oppressively burdensome. In doing so the court failed to consider the values of Nancy and her family. The court determined that the gastrostomy tube is invasive only at the time of its insertion. It found that after insertion the tube is merely a conduit for the liquid food being used to sustain Nancy, and not a treatment. 760 S.W.2d at 422, 423.

In contrast, other courts have found that feeding through a gastrostomy tube is medical treatment. *See, e.g., Gray v. Romeo*, 691 F.Supp. 580, 586, 587 (D.R.I. 1988). The Massachusetts Supreme Court, after describing the gastrostomy tube in detail, determined that the provision of artificial nutrition and hydration is treatment that ". . .is not only intrusive but extraordinary." *Brophy v. New England Sinai Hospital*, 398 Mass. 417, 497 N.E.2d 626, 630, 631, 637 (1986). In so finding, the court looked to the total circumstances of Mr. Brophy's situation, including the facts that he could not swallow and could be maintained on the tube for several years. *Id.*

The Missouri Court, unlike the Massachusetts court, failed to understand the implications of a gastrostomy tube. Over an extended period of time the tube requires care and maintenance, and may cause adverse side effects.[8] The lower

[8]The United States Office of Technology Assessment described the placement and associated risks of the various tube feeding techniques. Potential problems arising from a gastrostomy tube include aspiration, skin irritation around the tube site, and displacement of the tube into the abdominal cavity. Office of Technology Assessment, *Life-Sustaining Technologies and the Elderly* (1987).

court in Nancy Cruzan's case found that additional surgery would be necessary if the tube needed to be repaired or replaced. 760 S.W. 2d at 433 (Higgins, J., dissenting). The possibility of repeated insertions, coupled with the attachment to tubes and medical equipment, make this procedure extraordinary and continuously burdensome to those whom it is meant to benefit.

The court also misconstrued Nancy Cruzan's values when it determined that the tube was not burdensome to her. It reasoned that since Nancy Cruzan cannot feel pain or respond to care, feeding by a tube already in place is not a painful invasion. 760 S.W.2d at 423. Yet it is precisely because Nancy Cruzan can neither feel pain nor respond to her environment that the treatment is so burdensome. Nancy Cruzan did not wish to continue her life if sick or injured unless she could live "halfway normally." *Id.* at 411. The absolute lack of cognitive awareness, an existence which even the majority concedes is permanent, *Id.* at 422, is not living a "halfway normal" life. The continued use of the gastrostomy tube is unduly burdensome to Nancy since it maintains her in a condition in which she did not desire treatment to continue.

2. Many senior citizens believe that administration of artificial sustenance as provided to Nancy Cruzan is burdensome and unwanted medical treatment.

Amici, both of whom are senior citizens, want to maintain control over their medical decisions up until the end of their lives. They do not want to be supported indefinitely by life-sustaining equipment if in a medical condition from which they cannot recover, but would prefer to die a quiet, dignified death. Their hope is to prevent what happened to their family members, and what is happening to Nancy Cruzan, from happening to them.

Studies show that many senior citizens are in agreement with Amici.[9] Older citizens are more accepting of death than are younger individuals, and consider death preferable to living with progressively deteriorating physical health, its concomitant physical discomfort to them and its increased burden to their loved ones.[10] One author notes:

> [I]n the minds of some people the real horror is of living too long, of being kept alive by machines and intravenous feedings—and being incapacitated, dependent, impotent, in pain, and unable to communicate. In such a situation, we are not prolonging life, but death. . . . Most people want to have some say about how their life ends. They don't want to hang on indefinitely maintained by machines.[11]

Although the *Cruzan* court views the gastrostomy tube as merely another way to feed Nancy, Medicare policy recognizes the difference between tube and other assisted feedings. Tube feeding is a medical procedure requiring the skills of trained personnel; assisted feeding is personal care. The federal government recognizes that feeding through a gastrostomy tube requires more medical supervision than the average activities of daily life, including help with feeding.[12] Medicare reim-

[9]In *Aging, The Individual, and Society* at 328 (4th Ed. St. Paul, 1989), gerontologist Georgia M. Barrow says, "Polls show that adults of all ages support the right to die by refusing treatment."

[10]V. Marshall, *Last Chapters: A Sociology of Aging and Dying*, at 168-175 (1980).

[11]D. Tomb, *Growing Old: A Handbook For You and Your Aging Parent* ¶ 303 (1984).

[12]In order to receive Medicare reimbursement for nursing home care, the patient must, among other requirements, be receiving "skilled nursing services." Skilled nursing services are those which require the skills of qualified technical or professional health personnel and which are provided under their supervision. 42 U.S.C. §§ 1395d(a)(2), 1395x(h)(Supp. V 1987). Medicare regulations and interpretive guidelines specifically state that gastrostomy feedings qualify as skilled nursing services. 20 CFR

burses an eligible facility for care given to a patient who is being fed through a gastrostomy tube, but not for assistance with eating.

Amici as well as other senior citizens are concerned about the impact of the Missouri court's determination that the gastrostomy tube is not burdensome to Nancy. The court's finding conflicts with their own beliefs and those of countless other senior citizens that artificial sustenance is a burdensome medical treatment that they wish to refuse if and when they are in a persistent vegetative state.

3. The court's finding will have an adverse impact on families of patients in a persistent vegetative state.

The implication of the Missouri court's determination that the invasion only occurs when the tube is inserted, is that a patient can only exercise her right to refuse treatment at the time of the insertion. This is contrary to all understanding of the right to refuse treatment. The patient at any time can change her mind and decide to decline treatment that has already commenced. *Gray v. Romeo*, 697 F.Supp. at 588. To say that the patient, attached to the tube, loses her right to seek removal of the tube because, one, it is already inserted, and two, the substance coming through the tube is not a treatment, deprives the patient of her control over her bodily integrity. Just as an adult patient is not required to continue

409.33(b)(2), Medicare Intermediary Manual §3132.2. Care which is primarily custodial in nature and which does not require the skills of qualified technical or professional personnel, however, is not covered under Medicare. 42 U.S.C. § 1395y(a)(9).

Assistance with eating is specifically listed in the Medicare regulations as a personal care service for which there is no reimbursement. 20 CFR 409.33 (d)(11).

chemotherapy once treatment had begun, neither should a patient be required to maintain a gastrostomy tube once it has been inserted.

The burden of the Missouri court's reasoning falls most heavily upon family members of patients in a persistent vegetative state who are attached to a gastrostomy tube. If consent is only necessary at the time of insertion, and there is no right to refuse continued treatment beyond that point, family members could be forced to determine prematurely whether the patient would have wanted this kind of treatment under the circumstances. Nancy's family consented to the insertion of the tube at a time when they were still hopeful for her recovery, 760 S.W. 2d at 422, as did the families of Marcia Gray, Paul Brophy, Nancy Jobes, and James Fields. Unfortunately, the treatment did not assist in their recovery. If Amicus Fields and the other families who successfully sought removal of feeding tubes had known that once they consented to the treatment they could not discontinue it, they may not have consented at all. Ironically, the effect of the Missouri court's ruling may be to discourage loving and involved families from agreeing to certain kinds of care, and needlessly making premature decisions. *In re Conroy*, 486 A.2d at 1234; *Gray v. Romeo*, 697 F.Supp. at 589, 590, n. 4.

C. The Court Failed to Consider Other Relevant Factors

Other factors should have been considered in making a judicial determination whether to allow the withholding of life-supporting procedures. *In re Jobes*, 108 N.J. 394, 529 A.2d 434(1987); *Foody v. Manchester Memorial Hosp.*, 40 Conn. Supp. 127, 482 A.2d 713 (1984). *Matter of Spring*, 380 Mass. 629, 405 N.E.2d 115 (1980). The presence or absence of these factors may tip the scales used to balance the patient's interest

against the four interests of the state that were enumerated in *Saikewicz*.[13] Courts have acknowledged that the state's interest, although strong, decreases as the treatment becomes more intrusive and the prognosis worsens. There is no state interest sufficient to overcome the right to withdraw treatment from an individual in a persistent vegetative state from which there is no cure. *In re Quinlan*, 355 A.2d at 664, 665 (1976); *Foody v. Manchester Memorial Hospital*, 40 Conn. Supp. 127, 482 A.2d 713, 718 (1984); *Rasmussen v. Fleming*, 741 P.2d at 683, 684.

The court in *Brophy v. New England Sinai Hospital*, found that the state's interest in the preservation of life means more than the preservation of mere corporeal existence. In certain instances the maintenance of that existence is degrading to an individual's humanity. "The duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity." 497 N.E.2d at 635.

Unfortunately, Nancy Cruzan, Karen Quinlan, Paul Brophy, Joseph Gardner, Marcia Gray, Katherine Buker and James Fields have or had no hope of returning to their previous states of health, regardless of their medical care. All are or were in a persistent vegetative state from which there is or was no hope of recovery. The treatment they received, whether via a respirator or feeding tube, had no curative or even therapeutic effect upon the underlying conditions from which they suffered or continue to suffer.

[13]These four interests are the preservation of life, the prevention of suicide, the protection of innocent third parties, and the preservation of medical ethics. 370 N.E.2d at 425, 426. The *Cruzan* court determined that only the interest in the preservation of life is implicated in this case. 760 S.W.2d at 419.

In rejecting the analysis that the patient's rights increase as the prognosis dims, the Missouri court failed to recognize the distinction between refusing curative treatment and refusing treatment that at best maintains but does not treat or cure. 760 S.W.2d at 421, 422. To reach an outcome it finds desirable, the court arbitrarily discounts Nancy's "side of the equation," and the rights of those who would choose to die a natural death. *Id.* at 421. As a result, Nancy is maintained in a condition which she finds unacceptable, and which intrudes on her right to self-determination.

Another factor which should have been considered was the availability and good faith of the patient's family. This case and those of Amici must be distinguished from cases in which the patient has no caring and devoted family or friend to act on her behalf. See, e.g., *Rasmussen v. Fleming*. If no family is available, or if the family is not well-meaning, the state has a greater interest in protecting the patient under its parens patriae power, to insure that the individual's rights are not abused. *Matter of Spring*, 405 N.E.2d at 121.

In balancing these factors against the state's interests, courts should not consider the age of the patient.[14] All adults, regardless of age, retain the right to refuse or consent to health care. Younger people who would reject life sustaining treatment if in a persistent vegetative state should not have a greater burden to overcome because of their youth. Similar-

[14]United States Office of Technology Assessment, *Life-Sustaining Technologies and the Elderly* (1987). The Advisory Panel to this project included as one of its principles that decisions regarding the use of life-sustaining treatments must be made on an individual basis and should never be based on chronological age alone. *Id.* at 23. See, also, President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Securing Access to Health Care: A Report on the Ethical Implications of Differences in the Availability of Health Services* (1983).

ly, older persons who would choose treatment in the same circumstances should not have treatment terminated because of their age.

II. A COURT APPOINTED GUARDIAN HAS THE AUTHORITY TO MAKE HEALTH CARE DECISIONS ON BEHALF OF AN INCOMPETENT PATIENT.

Nancy Cruzan's parents were appointed her co-guardians, and in that capacity made their request to order the withdrawal of Nancy's gastrostomy tube. The Missouri court found no statutory authority to allow them to terminate or refuse treatment, but instead found that the statute only provides the guardian with power to assure the provision of and consent to medical care. The court further found that, because the co-guardians' power derives from the state, they cannot assert their daughter's right to refuse treatment. 760 S.W.2d at 424, 425. Amici are concerned that the Missouri construction could limit their authority to act for family members or to have their designated agents act on their behalf.

Other states which base the authority of the guardian on the state's parens patriae power allow the guardian to assert the right of the incompetent to refuse treatment, and have defined the authority to consent to treatment more broadly than the Missouri court. *Rasmussen v. Fleming* held that the guardian's authority under Arizona's statute to consent to medical care included the right to refuse treatment, "[t]o hold otherwise would...ignore the fact that oftentimes a patient's interests are best served when medical treatment is withheld or withdrawn." 741 P.2d at 688. *Rasmussen* relied on *Matter of Guardianship of Hamlin*, 102 Wash.2d 810, 689 P.2d 1372 (1984), in which the guardian sought to terminate life support. The Washington statute was similar to the Missouri statute in expressly requiring the guardian to care for the ward, act

in the ward's best interests, and provide consent for medical treatment. Nevertheless, *Hamlin* concluded that in some cases refusal of medical treatment would be in the ward's best interests, and held that, under the statute, the guardian could consent to the termination of life-support. *Id.* at 1375. *See, also, In re Drabick*, 245 Cal.Rptr. 840 (Cal.Ct.App.), *cert.den.* 109 S.Ct. 399 (1988).

All jurisdictions other than Missouri recognize a guardian's authority to refuse treatment, merely differing as to whether the court or its designee will act in the capacity of guardian. Some states, in acknowledging the authority of the guardian to exercise the ward's right to refuse treatment, allow the guardian to assert that right without first seeking court approval. Arizona, California and New Jersey see the judicial process as being unduly burdensome, and find no need for judicial intervention absent conflict among the parties. *Rasmussen*, 741 P.2d at 691; *In re Drabick*, 245 Cal.Rptr. at 844, 845; *In re Jobes*, 108 N.J. at 423. Other states require that authority to exercise the right be granted the guardian by the court. Amicus Burgoon as guardian sought court approval for removal of her mother's feeding tube because under Maryland law, the court must authorize any medical procedure that involves a substantial risk to the ward's life. Md. Estates And Trusts Code Ann. § 13-708(8) (Supp. 1988).[15] See also, *Saikewicz*, 370 N.E.2d at 434-435.

Amicus Burgoon is especially concerned that a guardian be able to exercise the right to refuse or withdraw unwanted treatment. The feeding tube which she sought to remove from her mother had been inserted without the consent of her

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[15]The Maryland Attorney General confirms the need for court authorization of a request by a guardian to terminate life-supporting equipment. 73 Opinions of the Attorney General,—(1988) [No. 88-046] (Oct. 17, 1988)].

mother or any family member. If she, as guardian, could not request the removal of the unauthorized tube, then no one would have been able to correct the initial violation of her mother's right to be protected from unconsented to treatment. Courts have recognized that the rights of individuals who have suffered a loss of brain function are only meaningful if exercised by agents acting on behalf of principals. *See Gray v. Romeo*, 691 F.Supp. at 587 (quoting *Thompson v. Oklahoma*, ____ U.S. ____, 108 Ct. 2687, 2693 n. 23 (1988) (plurality opinion)).

Amici want to ensure that if placed under a guardianship in future years, their guardians will be able to make all medical decisions on their behalf, including a decision to withdraw life-support if they are in a persistent vegetative state.

III. A STATE'S POLICY AS SET FORTH IN ITS LIVING WILL STATUTE DOES NOT CONTROL AN INDIVIDUAL'S CONSTITUTIONAL RIGHT TO DETERMINE TREATMENT

he Missouri court acknowledged that the state's living will statute is not applicable to Nancy Cruzan, since she never executed such a document. 760 S.W.2d at 420. Nevertheless, it used the public policy enunciated in the living will legislation to limit Nancy Cruzan's constitutionally protected rights. It interpreted the policy as requiring the unqualified preservation of life, and the protection of the lives of similarly situated citizens who lacked the support of a caring family like the Cruzans. Because it found the declared legislative policy to be so strong, the court found that it outweighed any of Nancy Cruzan's interests. The court concluded that any change in policy to weaken the State's interest must come from the legislature and not the courts. *Id.*, at 426.

Other jurisdictions whose living will statutes preclude the

termination of nutrition and hydration have determined that the statutes did not limit the constitutional and common law rights of individuals who had not executed living wills. *Corbett v. D'Alessandro*, 487 So.2d 368 (Fla. App.), *rev.den.* 492 So.2d 1331 (Fla. 1986) (statute does not affect constitutional right of patient in persistent vegetative state to forego artificial sustenance); *In re Gardner*, 534 A.2d 947 (Me. 1987) (statute did not limit common law right of patient in permanent vegetative state to forego artificial sustenance).

The Maryland Attorney General recently construed the Maryland living will statute, Md. Health General Code Ann. section 5-60 et. seq. (Supp. 1988), to be cumulative with other rights concerning life-sustaining equipment. 73 Opinions of the Attorney General, 19-22 (1988) [Opp 88-046 (Oct. 17, 1988)]. Despite the specific statutory language precluding the withholding of artificial sustenance, the Attorney General concluded that an individual, in a living will or through other means, can still request that such treatment not be provided. The Attorney General determined that an interpretation of the statute to require the administration of artificial sustenance to an individual who expressly rejected such treatment, or to give less decision-making authority to competent adults who execute living wills than to those who use other means of expressing their preferences[16], would not survive a constitutional challenge. Id. at 20-23.

The construction of living will statutes is of the utmost importance to Amici. They urge this Court, if it must decide the issue, to find the Missouri statute to be cumulative with, and

[16]The opinion also authorizes the use of durable powers of attorney for health care, *Id.* at 23-24; and surrogate decision-making by family members and attending physicians if the patient is terminally ill, *Id.* at 35-38. Competent adults do not need to use formally executed documents such as powers of attorney and living wills, but may simply tell their attending physicians of their decisions. *Id.* at 24-25.

not in derogation of, the constitutional right to refuse treatment. Because the Maryland's courts have not yet ruled on the issue, Maryland residents rely on their state's Attorney General's opinion as authority for their written directions to withhold or terminate artificial sustenance. The Missouri court's interpretation that the policy stated in its living will statute limits the constitutional right to refuse treatment, negates Amici's right to exercise and voice their treatment choice. If this Court sanctions the interpretation adopted by the *Cruzan* majority limiting their constitutional rights, Amici face the possibility of the Maryland courts adopting a similar policy, rather than the interpretation of the state Attorney General. Their right to refuse medical treatment that is invasive to their persons and contrary to their personal beliefs would be severely curtailed.

IV. CONCLUSION

For all of the reasons outlined above, *Amici Curiae* Burgoon and Fields urge this Court to reverse the decision of the Missouri Supreme Court.

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